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Supreme Court, U.S.
FILED
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CLERK

No. 97-131

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

A-1 APPLIANCE; ALBO APPLIANCE; **APPLIANCE WORLD, INC.;** BLONDER'S DISCOUNT APPLIANCE CENTER, INC.; **CT'S VIDEO AND APPLIANCES;** INNERSPACE, INC.; **JOHNNIES APPLIANCE;** NATASTI'S INC.; **POMOLIO APPLIANCE;** WOODBURY APPLIANCE; **YERKES APPLIANCE,**
Petitioners

v.

DEUTSCHE FINANCIAL SERVICES CORP.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

Respondent has argued in its *Brief in Opposition* that: (1) it was prevented by the trial court from making its full argument, and (2) ITT's position is identical to the case of Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir. 1993), *reh.en banc den.* 1993 U.S. App. Lexis 11413, *cert. den.* 126 U.S. 252 (1993). These arguments are flawed.

I.) ITT was not prevented by the trial judge from making its argument. The Third Circuit made no finding of fact that Respondent was prevented from making its argument. The record is clear. The respondent and the trial judge stated as follows:

> RESPONDENT: *Before we do that, Your Honor, I have motions to make under Rule 50 for directed verdict. So, I don 't know how the Court would like to handle that.*
>
> THE COURT: *Well, unless you have something new and unknown to me, I 'm going to deny your motion now on the issues -- on the basis that these constitute issues of fact, not of law for the Court to decide.*
>
> RESPONDENT: *As long as my motion is noted of record.*
>
> THE COURT: *It is noted.*

See page 465 of Appellate Appendix, volume 2.

It is clear from a reading of the record that Respondent had an opportunity to state its objection to the insufficiency of the evidence to support unclean hands and failed to do so. Petitioner and the trial judge both understood Respondent at the Rule 50(a) motion to be preserving issues which had been raised at trial prior to the motion. Insufficency of the evidence of unclean hands had not been raised up to that point in the trial. The trial judge clearly gave counsel the oppurtunity to raise this new issue at that time and counsel failed to raise the new issue.

II.) ITT argues that its position is identical with the case of Miller, *supra. See* page 6 of *Brief in Opposition.* This simply is not true. The trial court in Miller specifically addressed the sufficiency of evidence argument at the time that a Rule 50(a) motion should have been made and specifically prevented the litigant from making a Rule 50(a) motion. It stated as follows:

> THE COURT: *I have been in here with all of you two weeks. I heard the evidence. I am satisfied there is sufficient evidence on all of the issues of negligence and unseaworthiness to submit the case to the jury. And I am going to overrule all the motions, exceptions noted, I have.*
>
> Miller, 989 F.2d at 1465.

In the instant case Respondent was not prevented from making an objection and there has been no finding of fact by the Third Circuit below that Respondent was prevented from making an objection. **The Third Circuit below improperly stated a rule of law.** It held that when the trial judge told Respondent that "nothing further was required" during its Rule 50(a) motion that Respondent had no duty to state its objection regarding insufficiency of evidence as to the unclean hands defense. *See* page 9a of *Petition.* This is not the law in Miller. It is clear from reading Miller that "apparent awareness" only applies if the trial judge prevented the litigant from stating its objection during its Rule 50(a) motion.

In the instant case, Respondent always had an opportunity at the trial to object to the sufficiency of evidence regarding unclean hands. Respondent simply chose not to do so, and in so doing should have been considered to have waived its right to make such an objection/argument on appeal.

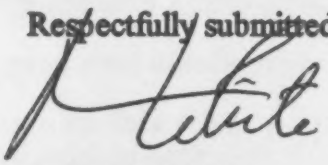
Petitioner is not asking for a "slavish application" of Rule 50 as suggested by Respondent.. Fairness dictates that the non-moving party be apprised of any of the movant's agruments so that it may have the oppurtunity to reopen its

case and present additional evidence. *See* Bonjorno v. Kaiser Alum. & Chem. Corp., 752 F.2d 802 (3d Cir. 1984), *cert.den.* 477 U.S. 908 (1986), and Lowenstein v. Pepsi-Cola Bottling Co., 536 F.2d 9, 11(3d Cir), *cert. denied*, 429 U.S. 966, 97 S. Ct. 396, 50 L.Ed.2d 334 (1976). The Third Circuit erred when it considered the insufficiency of evidence issue on appeal because Petitioners were never given an oppurtunity to present additional evidence. In so doing it departed from the accepted and usual course of judicial proceedings. *See* Neely v. EBY Construction Co., 386 U.S. 317; 87 S.Ct. 1072; 18 L. Ed. 75 (1967).

CONCLUSION

For the foregoing reasons, and the reasons presented in the original Petition, the Petitioner respectfully prays that the petition for writ of certiorari be granted.

Respectfully submitted,



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